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Mr Justice Swayne

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SUPREME COURT OF THE UNITED STATES.

No. 176.

JOHN P. INGLE, EXECUTOR OF ANN R. DERMOTT, DECEASED, PLAINTIFF IN ERROR,

vs.

CHARLES S. WALLACH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

GOVERNMENT PRINTING OFFICE.

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1 *Writ of error.*

UNITED STATES OF AMERICA,
District of Columbia, to wit:

The President of the United States to the judges of the circuit court of the District of Columbia, sitting for Washington county, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court, before you or some of you, wherein Charles S. Wallach is plaintiff, and John P. Ingle, executor of Ann R. Dermott, is defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in said Supreme Court to be then and there held; and that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, which of right and according to the laws and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of said Supreme Court.

Issued this 7th day of June, 1862.

JNO. A. SMITH, *Clk.*

2 *Citation.*

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to Charles S. Wallach, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the District of Columbia for the county of Washington, wherein John P. Ingle, executor of Ann R. Dermott, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. James Dunlop, chief judge of the circuit court of the District of Columbia, this 7th day of June, 1862.

JAS. DUNLOP.

Service acknowledged.

J. M. CARLISLE.

3 *Appeal bond—copy.*

Know all men by these presents that we, John P. Ingle and Joseph Ingle, are held and firmly bound unto Charles S. Wallach in the sum of three hundred dollars, current money, to which payment, well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this sixth day of June, eighteen hundred and sixty-two.

Whereas lately, at a circuit court of the District of Columbia, sitting for the county of Washington, in a suit depending in the said circuit court, wherein Charles S. Wallach was plaintiff, and John P. Ingle, executor of Ann R. Dermott, was defendant, judgment was rendered against the said defendant, and he having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles S. Wallach, citing and admonishing him to appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

4 Now, the condition of the above obligation is such that if the said John P. Ingle, executor of Ann R. Dermott, shall prosecute his writ with effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be null and void; otherwise, to be and remain in full force and virtue in law.

JOHN P. INGLE. [SEAL.]
JOS. INGLE. [SEAL.]

Signed, sealed, and delivered in the presence of—
C. B. BAKER.

Approved.

JAS. DUNLOP.

A true copy. Test:

JNO. A. SMITH, *Cl'k.*

5 *Style of court.*

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the first Monday of May, being the fifth day of the same month, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth—

Present: The Hon. James Dunlop, chief judge; James S. Morsell and Wm. M. Merrick, assistant judges; Ward H. Lamon, esq., marshal; John A. Smith, clerk.

In the records of proceedings of the same court, among others, are the following, to wit :

CHARLES S. WALLACH
ag'st
JOHN P. INGLE, ex'or of Ann R. Dermott.

Be it remembered that heretofore, to wit, on the sixteenth day of January, 1862, being the January term of said court, the said plaintiff, by James M. Carlisle, esq., files in court the mandate of the Supreme Court, in the words following, to wit :

Mandate.

UNITED STATES OF AMERICA, *ss:*

6 *The President of the United States of America to the honorable the judges of the circuit court of the United States for the Dis-*
[SEAL.] *trict of Columbia, sitting for the county of Washington, greeting:*

Whereas lately, in the circuit court of the United States for the District of Columbia, before you, or some of you, in a cause between Charles S. Wallach, plaintiff, and Ann R. Dermott, defendant, the judgment of the said circuit court was in the following words, to wit: "It is considered by the court here that the said plaintiff recover against the said defendant the aforesaid goods, wares, and merchandise in the declaration aforesaid mentioned, and that he have a return of the same, to be detained to him irrepleviable forever, &c. ; and it is also considered by the court here that the said plaintiff recover against the said defendant as well the sum of one cent, current money, his damages aforesaid. by the jurors aforesaid, in form aforesaid assessed, as also the sum of —— dollars and —— cents, by the court here unto him, on his assent, adjudged for his costs and charges by him about his suit in this behalf laid out and expended ; and the said defendant, in mercy, &c.," as by the inspection of the transcript of the record of the said circuit court, which was brought into
7 the Supreme Court of the United States by virtue of a writ of error sued out by the said Ann R. Dermott, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas at the last term of this court the death of Ann R. Dermott, the plaintiff in error, was suggested, and the appearance of John P. Ingle, the executor, was filed and entered, and it was ordered by the court that the said John P. Ingle, executor, should be made the plaintiff in error, and it was done accordingly ; and whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty-one, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel ; on consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with

costs ; and that the said plaintiff in error, John P. Ingle, executor, recover against the said defendant in error, Charles S. Wallach, seventy-six dollars and forty-two cents, for his costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same
8 is hereby, remanded to the said circuit court, with directions to award a *venire facias de novo.*

JAN. 6.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the honorable Roger B. Taney, chief justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-one.

Record in original suit.

And the said defendant appears in court here, by Robert J. Brent, esquire, his attorney ; thereupon, by directions of the parties, by their said attorneys, and by order of court, the papers in the original suit are brought forward and filed in this cause, to wit :

Be it remembered that heretofore, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and fifty-seven, the said plaintiff, by Carlisle and Maury, esquires, his attorneys, filed in court here a certain writing obligatory, commonly called a replevin bond, in the words and of the tenor following, to wit :

Rep. bond.

Know all men by these presents that we, Charles S. Wallach, trustee, Richard Wallach, and George S. Gideon, all of Wash-
9 ington county, in the District of Columbia, are held and firmly bound unto Ann R. Dermott in the sum of six thousand dollars, current money, to which payment, well and truly to be made and done, we do hereby bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 18th day of May, 1857.

Whereas the above-bound Charles S. Wallach, trustee, is about to prosecute and sue forth out of the circuit court of the District of Columbia for the county of Washington the United States writ of replevin, to be directed to the marshal of said District, and returnable to next October term, commanding the said marshal to replevy and deliver to him, the said Charles S. Wallach, trustee, the following goods and chattels, to wit: one steam boiler and fixtures, large cooking range and fixtures, one piano-forte, cover, and stool, three pier glasses, sixty-five hair mattresses, one hundred pairs blankets, fifty carpets, sixty bureaus, one hundred pillows and bolsters, and

sixty-five washstands, which the above-named Ann R. Dermott has taken and unjustly detains, as it is said:

Now, the condition of the above obligation is such, that if the said Charles S. Wallach, trustee, do and shall well and truly prosecute said writ of replevin with effect, and shall well and truly deliver to
10 said Ann R. Dermott the goods and chattels aforesaid, if a return thereof shall be adjudged by the said court, then the above obligation to be void and of no effect; otherwise, to be and remain in full force and virtue in law.

CHARLES S. WALLACH, *Trustee.* [SEAL.]
RICHARD WALLACH. [SEAL.]
GEORGE S. GIDEON. [SEAL.]

Signed, sealed, and delivered in presence of—
A. G. PALMER.
JAS. W. NAIRN.

Record in original suit.

Thereupon, on the day and year aforesaid, the said plaintiff, by his attorneys aforesaid, prosecuted and sued forth out of the circuit court here the United States writ of replevin to the marshal of the District aforesaid, directed in form following, to wit:

Replevin.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the marshal of the District of Columbia, greeting:

Whereas Charles S. Wallach, of the county of Washington, hath come into the circuit court of the District of Columbia for the county aforesaid, and found sufficient sureties, as well his clamor to prosecute as for one steam-boiler and fixtures, one large cooking range and fixtures, one piano-forte, cover, and stool, three pier glasses, sixty-five hair mattresses, one hundred pairs blankets, fifty
11 carpets, sixty bureaus, one hundred pillows and bolsters, sixty-five washstands, the proper goods and chattels of him, the said Charles S. Wallach, which a certain Ann R. Dermott, of the county aforesaid, hath taken and unjustly detains against sureties and pledges, &c., (as it is said,) to be returned, if a return thereof shall be adjudged:

You are therefore hereby commanded that the said goods and chattels, being in the county aforesaid, in your said district, you cause to be replevied and delivered to the said Charles S. Wallach; and that you put, by sureties and safe pledges, the said Ann R. Dermott that she be and appear before the said circuit court to be held for the county aforesaid, at the city of Washington, on the 3d Monday of October next, to answer the said Charles S. Wallach in a plea wherefore he took the goods and chattels of him, the said

Charles S. Wallach, and them unjustly detains against gages and pledges, &c.

And how you shall execute this writ make known to the said court at the day and place aforesaid, and have you then and there this writ.

Witness the Hon. James Dunlop, esquire, chief judge of the said court, the 5th day of May, 1857.

Issued this 18th day of May, 1857.

JNO. A. SMITH, *Cl'k.*
CARLISLE & MAURY.

12 At which mentioned third Monday of October, in the year of our Lord one thousand eight hundred and fifty-seven, and the day of the return of the aforegoing writ, comes into the circuit court here the said plaintiff, by his attorneys aforesaid, and the marshal of the District aforesaid, to whom the said aforegoing writ was, in form aforesaid, directed, makes return thereof to the court here, thus endorsed, to wit:

Marshal's return.

Replevied and delivered as per schedule and receipt.
J. D. HOOVER, *Marshal.*

Record in original suit.

And the said defendant, being so forewarned, appears in court here, by Brent & Brent, esquires, her attorneys; and thereupon, on motion of the said defendant, by her attorneys aforesaid, it is ruled by the court here that said plaintiff declare against the said defendant in the plea aforesaid, or judgment by the court here will be entered against him in default thereof. Thereupon the said plaintiff, by his attorneys aforesaid, declares against the said defendant in the plea aforesaid, in form following, to wit:

Nar.

DISTRICT OF COLUMBIA,
Washington County, sct.:

Ann R. Dermott, late of said county, was summoned to answer unto Charles S. Wallach in a plea wherefore she took the
13 goods and chattels of the plaintiff *plaintiff*, and them unjustly detains, &c.; and therefore the plaintiff complains, for that whereas the defendant heretofore, to wit, on the eighteenth day of May, in the year of our Lord eighteen hundred and fifty-seven, in the city of Washington, to wit, at the county aforesaid, in a certain dwelling and messuage, situate in the said city, and known and described as the "Avenue House," took the goods and chattels of the plaintiff, as follows, that is to say: one steam-boiler and fixtures, one large cooking range and fixtures, one piano-forte, cover, and stool,

three pier glasses, sixty-five hair mattresses, one hundred pairs blankets, fifty carpets, sixty bureaus, one hundred pillows and bolsters, sixty-five washstands, of great value, to wit, of the value of six thousand dollars, and them unjustly detains against sureties, pledges, &c.

And therefore the plaintiff says he is injured and hath sustained damages to the value of one thousand dollars, and therefore he brings suit, &c.

CARLISLE & MAURY,
Att'ys for Plaintiff.

Rule plea.

And the said plaintiff, by his attorneys aforesaid, prays that the said defendant may answer to the declaration of him, the said plaintiff, in the plea aforesaid. Whereupon it is ruled by the court here
14 that the said defendant answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, or judgment of the court here will be entered against him in default thereof.

And the said defendant, by his attorneys aforesaid, comes and defends the wrong and injury, when, &c., and says that the goods and chattels in the declaration mentioned are the property of the defendant, and not the property of the said plaintiff; and of this he puts himself upon the country, and the said plaintiff doth the like, &c.

Avowry.

And the said defendant, by his attorneys aforesaid, further defends the wrong and injury, when, &c., and well avows the taking of said goods and chattels in the place where, &c., and justly, and so forth. Because she saith that a certain Melvin A. Dexter, for a long time next before the said taking, and from the 18th day of August, in the year of our Lord eighteen hundred and fifty-five, and from thence until and at the said time, when, &c., held and enjoyed all those certain messuages, tenements, and buildings, erected on lots 1 and 2, in square 432, and fronting on Market space and 7th street west, in Washington city, in the District of Columbia, (saving and excepting certain parts of said buildings, messuages, and tenements, excepted and reserved in the demise hereinafter mentioned,) in which,
15 &c., with the appurtenances, as tenant thereof to the said avowant, by virtue of a certain demise to him, the said Dexter, theretofore made, at and under a certain yearly rent of three thousand dollars, payable in monthly instalments of two hundred and fifty dollars each, commencing for the first of said instalments on the first day of November, A. D. 1855, for and during the full term of three years next ensuing the first day of October, A. D. 1855; and in which said demise it was stipulated, among other things, that if the said Melvin A. Dexter should at any time during the said term remove or attempt to remove any of his goods, chattels, wares, or merchandise, from the said premises, with the consent in writing of the

said Ann R. Dermott, except the same should be replaced with goods, chattels, wares, and merchandise, of equal value, then, and in that case, and immediately upon the happening thereof, one whole year's rent, to wit, the rent of three thousand dollars over and above all rents then accrued, should be paid by the said Melvin A. Dexter to the said Ann R. Dermott, and the same should immediately thereupon accrue and become due and owing from the said Dexter to the said Ann, and the same might be levied by distress and sale of all such goods and chattels as should or might be found on the premises
16 liable to distress for rent; and because the said Dexter during said term, to wit, on the eighteenth day of May, A. D. one thousand eight hundred and fifty-seven, did attempt to remove, and in fact did remove, divers of his goods, chattels, wares, and merchandise, of great value, to wit, of the value of $6,000, from said premises, without the consent in writing of said Ann R. Dermott, and without replacing the same as aforesaid; whereupon one whole year's rent, to wit, the rent of three thousand dollars, over and above all rents then accrued, became due and owing from the said Dexter to the said Ann, according to the force and effect of said demise; and the said amount of three thousand dollars so due and owing was afterwards, to wit, on the 17th day of May, A. D. 1857, demanded by the said Ann of and from the said Dexter, and payment then and there refused by said Dexter; and because the said rent of three thousand dollars so as aforesaid due and owing, and so demanded as aforesaid on the said 17th day of May, A. D. 1857, and from thence until and at the said time when, &c., was due and in arrear from the said Dexter to the said avowant, she, the said avowant, well avows the taking of the said goods in the premises so as aforesaid demised to the said Dexter, and justly, &c., as for and in the name of a distress for
17 the said rent so demanded, in arrear and due to the said avowant; and this she is ready to verify, &c. Wherefore she prays judgment and a return of said goods and chattels, according to the form of the statute in such case made and provided, to be adjudged to her, &c.

2d. And by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said Ann R. Dermott further well avows the taking of said goods and chattels in the place in which, &c., and justly, &c., because she saith that she, the said avowant, for a long time, to wit, during all the time when the rents hereinafter mentioned were accruing due, and from thence until and at the time when, &c., was landlady to a certain Melvin A. Dexter, of the premises in which, &c.; and that he, the said Dexter, for a long time from and after the 18th day of August, A. D. 1855, and from thence until and at the said time when, &c., held and enjoyed the said premises, in which, with the appurtenances, as tenant thereof to this avowant, under a certain demise thereof, made on the said 18th day of August, A. D. 1855, at and under certain rents thereby and therein stipulated to be paid by the said Dexter to the said avowant.

And because the sum of three thousand dollars of the rent afore-

said, at the said time when, &c., was due and in arrear from
18 the said Dexter to the said avowant, according to the terms
and effect of said demise, she, the said avowant, well avows
the taking of said goods and chattels on said premises, in which, &c., as for and in the name of a distress for the said rents so due and in arrear to the said avowant as aforesaid; and this she is ready to verify, &c.

Wherefore she prays judgment, and a return of said goods and chattels, together with damages, &c., according to the form of the statute in such case made and provided, to be adjudged to her, &c.

1st replication.

And the said plaintiff saith that the said defendant, for the reasons in his said first and second avowries alleged, ought not to avow the taking of the goods, &c., aforesaid, in the said place where, &c., first, because he saith that the said several sums of three thousand dollars, of the rent aforesaid, at the time when, &c., were not, nor was either of them, or any part thereof, in arrear and unpaid to the said defendant at the time when, &c., as the said defendant in her avowries aforesaid hath above alleged; and this he prays may be inquired of by the country, &c., and the defendant doth the like, &c.

2d replication.

And for a further plea in this behalf to the said first avowry of said defendant, the said plaintiff, by leave of the court here
19 for that purpose first had and obtained, according to the form of the statute in such case made and provided, saith that defendant, by reason of anything in her said avowry alleged, ought not to avow the taking of the goods and chattels aforesaid of the s'd plaintiff, in the said place in which, &c., and justly, &c., because he saith that in fact the said sum of three thousand dollars in said avowry mentioned was not demanded by the said Ann R. Dermott of and from the said Dexter, in manner and form as the said defendant hath above thereof in said avowry alleged; and this the said plaintiff prays may be inquired of by the country, and the said defendant doth the like, &c.

Venire facias.

Therefore let a jury thereon appear before the court here immediately by whom, &c., and who neither, &c., to recognize, &c., be cause as well, &c.

Whereupon, for trying the issue aforesaid, it is ordered by the court here that twelve persons from the panel of jurors returned t the court here by the marshal of the District of Columbia be called, who, being called, come, to wit:

Jury.

1. Wm. Choppin.
2. John E. Neale.
3. Edward Deeble.
4. Zadock Williams.
5. Val. Blanchard.
6. Charles B. Cluskey.
7. Thomas Orme.
8. Terence Drury.
9. Charles Sioussa.
10. Thomas E. Jacobs.
11. James Dobbin.
12. William King.

Verdict.—Judgment.

Who, being duly empanelled and sworn to say the truth of
20 and upon the premises aforesaid, upon their oath do say that the said sum of three thousand dollars of the rent aforesaid, at the said time when, &c., was not in arrear and unpaid to the said defendant, nor was any penny thereof at the said time when, &c., in arrear to the said defendant, as the said plaintiff above by replying hath alleged; and they assess the damages of the said plaintiff, by reason of the taking and unjustly detaining of the goods and chattels aforesaid, to the sum of one cent current money. Therefore it is considered by the court here that the said plaintiff recover against the said defendant the aforesaid goods, wares, and merchandise, in the declaration aforesaid mentioned, and that he have a return of the same to be detained to him irrepleviable forever, &c. And it is also considered by the court here that the said plaintiff recover against the said defendant, as well the sum of one cent current money, his damages aforesaid by the jurors aforesaid in form aforesaid assessed, as also the sum of ———— dollars and ——— cents, by the court here unto him, on his assent, adjudged for his costs and charges by him about his suit in this behalf laid out and expended. And the said defendant, in mercy, &c.

Test: JNO. A. SMITH, *Clk.*

21 *Memorandum.*—Before the jurors aforesaid retired from the bar of the court here, the said defendant, by his attorneys aforesaid, filed in court here the following bills of exceptions, to wit:

Bill of exceptions.

CHARLES S. WALLACH
vs.
ANN R. DERMOTT.

On the trial of this case, the plaintiff, to maintain the issues on his part, gave in evidence a certain deed of trust, made and delivered to him by one Melvin A. Dexter, dated October 28, 1856, and duly recorded in liber J. A. S., No. 123, as follows:

Melvin A. Dexter to Charles S. Wallach.

Deed of trust, recorded 29th October, 1856, in liber J. A. S., No. 123, folios 285, 286, et seq.

This indenture, made this twenty-fourth day of October, in the year of our Lord eighteen hundred and fifty-six, between Melvin A. Dexter, of the county of Washington, in the District Columbia, of the first part, and Charles S. Wallach, of the same place, of the second part, witnesseth: Whereas the said party of the first part is justly indebted unto Cornelius Wendell, of Washington city, in the full sum of five thousand dollars, and for the said sum has passed to the said Cornelius Wendell his certain promissory note, bear-
22 ing even date with these presents, for the sum of five thousand dollars, and payable in six months after date, and being desirous to secure the payment of said promissory note when and as the same shall become due and payable, has agreed to make and execute these presents:

Now, therefore, this indenture further witnesseth: That for and in consideration of the premises, and of the sum of five dollars, current money of the United States, to him in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said party of the first part has bargained, sold, and delivered, assigned, transferred, and set over, and by these presents does grant, bargain, sell and deliver, assign, transfer, and set over, unto the said party of the second part, his executors, administrators, and assigns, all and singular the goods and chattels, household stuff and kitchen furniture, named and described in the schedule marked "A," and hereunto annexed, and now lying and being situate in a certain messuage or tenement and premises, on the corner of Louisiana avenue and 7th street, in Washington city, and occupied by the said party of the first part as a hotel and restaurant. To have and to hold the said goods and chattels, household stuff and kitchen furniture, unto him, the said party of the second part,
23 his executors, or administrators and assigns, to his and their own proper use, benefit, and behoof forever. In trust, nevertheless, to, for, and upon the following uses and trust, that is to say: In trust to suffer and permit the said party of the first part, his executors or administrators, to retain possession of, use and enjoy, the said goods and chattels, household stuff and kitchen furniture, until default made in the payment of said promissory note, or any note or notes, or any part of any note or notes, given in and by way of renewal thereof, or until the said party of the first part, his executors or administrators, do and shall suffer and permit any one quarter's rent of said messuage or tenement, or any messuage or tenement, in or to which the said goods and chattels, household stuff and kitchen furniture, or any part thereof, shall or may be removed, put, and placed, to become due and owing, and remain so due and owing, for the space of thirty days after the same shall have become so due and

owing, or shall suffer and permit any judgement to be recovered in any court of law or of equity, or before any magistrate or justice of the peace, against him, the said party of the first part, his executors or administrators, and execution or executions to be issued
24 thereon, and levied upon the said goods and chattels, household stuff and kitchen furniture, or any part or parcel thereof; and in case *of* the said party of the first part, his executors or administrators, do and shall fail to pay and satisfy said promissory note, or any note or notes, or any part of any note or notes, given in and by way of renewal thereof, or shall suffer and permit any one quarter's rent of said messuage or tenement, or any other messuage or tenement, in and to which the said goods and chattels, household stuff and kitchen furniture, or any part thereof, shall or may — removed, put, and placed as aforesaid, to become due and owing, and remain due and owing, for the space of thirty days as aforesaid, or any judgment as aforesaid to be recovered as aforesaid, and execution to be issued and levied as aforesaid, then and in either of these cases the said party of the second part, his executors or administrators, do and shall, at the request of the said Cornelius Wendell, or his executors, administrators, or assigns, take possession of said goods and chattels, household stuff and kitchen furniture, and, after giving at least ten days' notice in some paper printed and published in the city of Washington, sell the same at public sale upon such terms as he shall deem most advantageous to the parties concerned, and deliver the
25 same to the purchaser or purchasers thereof, and out of the proceeds of said sale, after retaining unto himself five per cent. upon the gross amount of said sale, for his trouble in executing this trust, pay, in the first place, all expenses of said sale, and, in the next place, pay to the said Cornelius Wendell, his executors, administrators, or assigns, the whole amount of said promissory note, or of any note or notes given in and by way of renewal thereof, or so much thereof as may then remain unpaid, it being understood and agreed, that on the happening of either of the aforesaid events, the whole of said promissory note, or any note or notes given in and by way of renewal thereof, shall and *and* to be considered due and payable and all credit thereon to cease, together with all interest which may have accrued thereon, and the balance, if any, pay over to the said party of the first part, his executors, administrators, or assigns. But in case the said party of the first part, his executors or administrators, do and shall well and truly, without default and without having suffered and permitted any rent to have become due and owing, and remain due and owing as aforesaid, or any judgment to be recovered and execution to be issued and levied as aforesaid, pay and satisfy said
26 promissory note, and all and every promissory note or notes given in and by way of renewal thereof, together with all interest which may accrue thereon when and as the same shall become due and payable, then, in that case, the said party of the second part, his executors or administrators, do and shall, at the request and cost of the said party of the first part, his executors, administrators, or assigns, make and execute unto him, the said party of the first part,

his executors, administrators, and assigns, good and sufficient deed of release of all and singular the said goods and chattels, household stuff and kitchen furniture. And the said party of the first part, for himself, his heirs, executors, and administrators, by these presents, covenants and agrees to and with the said party of the second part, his heirs, executors, administrators, and assigns, the said goods and chattels, household stuff and kitchen furniture, hereby bargained, sold, and conveyed, to insure and keep insured in the full sum of five thousand dollars, in some good and safe insurance office, during the continuance of this trust, and the policy and policies of such insurance or insurances, and the proceeds thereof, from time to time, during the continuance of this trust, to assign, transfer, and set
27 over unto him, the said party of the second part, his executors and administrators, to, for, and upon the uses and trusts, intents and purposes in this indenture mentioned. And in case of a failure on the part of the said party of the first part, his executors or administrators, to so insure and keep insured the said goods and chattels, household stuff and kitchen furniture, and the policy or policies of such insurance or insurances, and the proceeds thereof to assign, transfer, and set over as aforesaid, it shall and may be lawful to and for the said party of the second part, his executors or administrators, to so insure and keep insured the said goods and chattels, household stuff and kitchen furniture, and the costs, charges, and expenses of such insurance or insurances shall and may be and be considered part and parcel of the debt hereby secured or intended to be secured, and payable out of the proceeds of any sale or sales made in and by virtue of these presents, and by the said party of the first part, his executors, administrators, or assigns, before the making or executing of any deed of release, as hereinbefore provided.

In testimony whereof, the said party of the first part has hereunto subscribed his hand and affixed his seal, on the day and year first hereinbefore written.

M. A. DEXTER. [SEAL.]

28 Signed, sealed, and delivered in presence of—
F. J. MURPHEY.
WM. MARTIN.

Schedule "A," referred to in the foregoing deed in trust.

1 steam-boiler, furniture and fixtures, one large cooking-range and all the kitchen furniture, one bar-room marble floor, all the bar fixtures and furniture, one piano, fifty-five Brussels and velvet carpets on floors, sixty-five double and single bedsteads, sixty-five hair mattrasses, sixty-five shuck mattrasses, eight doz. mahogany hair-seat chairs, one double set of rosewood parlor furniture, three large parlor mirrors, one hundred pairs of fine wool blankets, fifty white spreads, fifty quilt comforts, eighty pair of linen sheets, one hundred pillows and bolsters, one hundred and four curtain to windows, one hundred do. shades, sixty-five bureaus, sixty-five washstands, twelve

doz. plate forks, 12 doz. table-straws, 12 doz. tea-spoons, 20 casters, 10 doz. table knives, 6 doz. desert knives, all the crockery, glass-ware, and table furniture and linen, five sideboards, six dining tables, 8 doz. dining chairs, one parlor carpet, sixty-five basin, eweres, and chambers, sixty-five chambers, mirrors, and all the office desks and furniture.

DISTRICT OF COLUMBIA,
Washington County, to wit:

29 On this twenty-fifth day of October, 1856, personally appeared before me, the subscriber, a justice of the peace in and for the county and District aforesaid, Melvin A. Dexter, party grantor to the foregoing instrument of writing and deed of trust, and acknowledged the same to be his act and deed, for the purposes therein set forth.

F. J. MURPHEY, *J. P.* [SEAL.]

And further gave evidence of the identity of the goods and chattels replevied in this suit, with those described in and conveyed by said deed of trust, and that the note described in the said deed fell due to Cornelius Wendell, therein named, and that default was made in the payment thereof, and that at the request of the said Cornelius Wendell, the holder thereof, the said plaintiff, on the 28th day of April, 1857, proceeded to advertize the said goods and chattels for sale on the 12th day of May next thereafter, and on the said last-mentioned day began to make such sale, by an auctioneer on the premises known as Dexter's Hotel, in the city of Washington, of which hotel the same were the furniture, and was proceeding with such sale day by day until the 18th of the said month of May, when a portion of said furniture having been sold, the defendant took the goods aforesaid under a distress, then and there levied for the sum of three thousand dollars, ($3,000;) and thereupon the plaintiff sued out the writ
30 in this case, and further proved that the rent of the said hotel and premises was paid up to and inclusive of the first day of the said month of May. And thereupon the defendant read in evidence the following lease from her to the said Dexter, of the said hotel and premises, dated August 18, 1858.

Lease.

A. R. Dermott to M. A. Dexter—lease.

These articles of demise and covenant, made and concluded this 18th day of August, 1855, between Anne R. Dermott, of the city of Washington, D. C., of the one part, and Melvin A. Dexter, of the same city, of the other part, witness: That the said Anne R. Dermott hath granted, leased, and demised, and by these presents doth grant, lease, and demise, unto the said Melvin A. Dexter, for and in consideration of the rents, covenants, and agreements hereinafter reserved, covenanted, and agreed to be paid, kept, and performed on

the part and behalf of him, the said Melvin A. Dexter, all those certain messuages, tenements, and premises heretofore leased and demised by her, the said Anne R. Dermott, to one Maria B. French; and also all those certain messuages, tenements, and premises heretofore leased and demised by her to one John C. Brashear, both being for certain terms of years, heretofore ended and determined, including in the two demises aforesaid the entire range of
31 buildings, messuages, and tenements erected on lots one and twelve in square 432, and fronting on Market space and 7th street west, in the said city, saving and excepting so much and such parts and parcels of said buildings, messuages, and tenements, with the appurtenances, as are now held and enjoyed by R. W. Carter, Peter H. Hooe, and partners Emanuel D. Etchison and Charles A. Liggett, assignee, Elijah M. Bartholow, who was assignee of one Cornelius G. Wildman, severally and respectively, as tenants of said Anne A. Dermott, under several demises by her heretofore made. To have and to hold all the herein and hereby granted and demised premises unto the said Melvin A. Dexter, from and after the date of these presents until the first day of October next, and from and after that day for and during the term of three years, fully to be completed and ended. And if the said Melvin A. Dexter shall, within the space of one year from and after the said first day of October, give notice in writing to the said Anne R. Dermott that he desires to extend the said term to the term of five years instead of three years, from and after the said first day of October, then and in that case, but not otherwise, to have and to hold the said demised premises to the said Melvin A. Dexter for and during the term of five years from
32 and after the said first day of October, fully to be completed and ended, he, the said Melvin A. Dexter, yielding and paying therefor rent and rents at the rate of three thousand dollars per annum, in the instalments, at the time and times, and in the manner following, that is to say: two hundred and fifty dollars on the first day of November next, and the like sum of money on the first day of each and every month thereafter during the said term; and if the said Melvin A. Dexter should elect to extend the term to five years instead of three years by giving notice as aforesaid, then, on the first day of each and every successive month during the said extended term. And the said parties do by these presents covenant and agree, the one with the other, as follows, that is to say: that the said Melvin A. Dexter shall not, and will not, at any time or times during the said term or extended term, assign or underlet the said premises, or any part or parcel thereof, for any term or time whatsoever, to any person or *or* persons whatsoever, without the express consent in writing of the said Anne R. Dermott, (except so far as is necessary to conduct his hotel;) and that he shall not, and will not, at any time or times during the said term or extended term, remove or attempt to remove any of his goods, chattels, wares, or merchandises from the said premises without the consent in writing of the said Anne
33 R. Dermott, except the same be replaced of equal value. And it is by these presents stipulated and agreed between the said

parties, and these presents are made and constituted upon the express condition, that if the said Melvin A. Dexter shall, at any time or times hereafter during the said term or extended term, so assign or underlet the said demised premises, or any part or parcel thereof, without such consent as aforesaid, or if he shall at any such time or times, without such consent, remove or attempt to remove any of his goods, chattels, &c., as aforesaid, then, and in either case or event, the said term and extended term shall, at the sole option and election of the said Anne R. Dermott, utterly cease and determine; and the said Anne R. Dermott shall and may, at her sole option and election, immediately thereupon re-enter upon and repossess herself of the said demised premises, and expel therefrom the said Melvin A. Dexter, and every assignee or under tenant who may be found in possession; and, moreover, that in either of the said cases, and immediately upon the happening of either of the said events, one whole year's rent, to wit, the rent of three thousand dollars, over and above all such rents, (that is to say, all such of the rents hereinbefore reserved to be paid on the first day of each and every month during the said term or extended term as shall have then already accrued,) shall be, and by these presents is, reserved to be paid by the said Melvin A.
34 Dexter to the said Anne R. Dermott, and shall immediately thereupon accrue and become due and owing from him, the said Melvin A. Dexter, to her, the said Anne R. Dermott, and shall and may be levied by distress and sale of all such goods and chattels as shall or may be there found on the premises liable to distress for rent; and that the said Melvin A. Dexter shall, at his own cost and charge, and without any charge or cost to the said Anne R. Dermott, put the said premises in good repair, and so keep and reserve them during the said term and extended term, and so deliver the same back to her at the end of such term; that the said Melvin A. Dexter shall and may, at the end of the said term, remove all such fire-grates and bar fixtures, also marble floor, as he may think fit to supply on the premises for the more convenient exercise of his business, so as the same be so contrived as to be removable without damage or defacement to the premises, and so as the premises be completely restored to good order and repair in such parts or any such improvements may be removed from. And it is further covenanted and agreed upon by and between Anne R. Dermott and Melvin A. Dexter, that if the said Melvin A. Dexter should not agree to the terms for the rent of the third-story room, immediately over the dining room, and which is now under lease to Peter H. Hooe & Co., and which is used
35 by them as a carpet room, at the expiration of their lease, that then and in that case the said Anne R. Dermott shall have a right of entrance and stairway where Messrs. Hooe & Co. have now a well-hole to take their carpeting into said room, that is to say, the right of stairway through one of the doorways in the store-room, fronting east, on 7th street west, through the dining room in second story, to said room in the third story of that portion of the building designated as the warehouse. And it is also further agreed, that wherever any joists are to be cut for stairway or doors, and win-

dows cut, and a proper flue and hearth for the protection of the property in fitting up the new kitchen, the said Anne R. Dermott is to be consulted, and her consent first had in writing.

Witness the hands and seals of the parties the day and year aforesaid.

ANNE R. DERMOTT. [SEAL.]
M. A. DEXTER. [SEAL.]

Sealed and delivered in the presence of—
EGLANTINE COKE.

And further gave evidence that the said Dexter executed the *the* plaintiff a prior deed of trust, dated November, 1855, as follows :

Melvin A. Dexter to Charles S. Wallach.

Deed trust, recorded 4th December, 1855, *in liber J. A. S., No.* 108, *fol.* 81, *&c.*

36 This indenture, made the fifth day of November, in the year of our Lord one thousand eight hundred and fifty-five, between Melvin A. Dexter, of the county of Washington, in the District of Columbia, of the first part, and Charles S. Wallach, of the same place, of the second part, witnesseth : Whereas the said party of the first part is justly indebted unto Cornelius Wendell, of the city of Washington, in the full sum of five thousand dollars, and for the said sum has passed to the said Cornelius Wendell his certain promissory note, bearing even date with these presents for the sum of five thousand dollars, and payable to the order of said Cornelius Wendell one year after date, with interest, and being desirous to secure the payment of said promissory note, when and as the same shall become due and payable, has agreed to make and execute these presents:

Now, therefore, this indenture further witnesseth: That for and in consideration of the premises, and of the sum of five dollars, current money of the United States, to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said party of the first part has bargained, sold, and delivered, assigned, transferred, and set over, and by these presents does bargain, sell, and deliver, assign, transfer, and
37 set over, unto the said party of the second part, his executors, administrators, and assigns, all and singular the goods and chattels, household stuff and kitchen furniture, named and described in the schedule marked "A," and hereunto annexed, and now lying and being situate in a certain messuage or tenement and premises on the corner of D and 7th streets, in the city of Washington, and occupied by the said party of the first part as a hotel, (called Dexter's Hotel.) To have and hold the said goods and chattels, household stuff, and kitchen furniture, unto him, the said party of the second part, his executors, administrators, and assigns, to his and their own proper

use, benefit, and behoof forever; in trust, nevertheless, to, for, and upon the following uses and trusts, that is to say: In trust to suffer and permit the said party of the first part, his executors or administrators, to retain possession of, use, and enjoy the said goods and chattels, household stuff and kitchen furniture, until default made in the payment of said promissory note, or of any note or notes, or of any part of any note given in and by way of renewal thereof, or until said party of the first part, his executors or administrators, do and shall suffer and permit any one quarter's rent of said messuage or tenement, or any messuage or tenement in or to which the said
38 goods and chattels, household stuff and kitchen furniture, or any part thereof, shall or may be removed, put, and placed, to become due and owing, and remain so due and owing for the space of thirty days after the same shall have become so due and owing, or shall suffer and permit any judgment to be recovered in any court of law or of equity, or before any magistrate or justice of the peace, against him, the said party of the first part, his executors or administrators, and execution or executions to be issued and levied upon the said goods and chattels, household stuff and kitchen furniture, or any part or parcel thereof; and in case the said party of the first part, his executors or administrators, do and shall fail to pay and satisfy said promissory note, or any note or notes, or any part of any note or notes given in and by way of renewal thereof, or shall suffer and permit any one quarter's rent of said messuage or tenement, or any other messuage or tenement in and to which the said goods and chattels, household stuff and kitchen furniture, or any part thereof, shall or may be removed, put, and placed as aforesaid, to become due and owing, and remain due and owing for the space of thirty days as aforesaid, or any judgment as aforesaid to be recovered as aforesaid, and execution to be issued and levied as aforesaid, then and in either of these cases the said
39 party of the second part, his executors or administrators, do and shall, at the request of the said Cornelius Wendell, or his executors, administrators, or assigns, take possession of said goods and chattels, household stuff and kitchen furniture, and, after giving at least ten days' notice in some paper printed and published in the city of Washington, sell the same at public sale, upon such terms as he shall deem most advantageous to the parties concerned, and deliver the same to the purchaser or purchasers thereof, and out of the proceeds of said sale, after retaining unto himself five per cent. upon the gross amount of said sale for his trouble in executing this trust, pay, in the first place, all expenses of said sale, and, in the next place, pay to the said Cornelius Wendell, his executors, administrators, or assigns, the whole amount of said promissory note, or of any note or notes given in and by way of renewal thereof, or so much thereof as may then remain unpaid, it being understood and agreed that on the happening of either of the aforesaid events, the whole of said promissory note, or any note or notes given in and by way of renewal thereof, shall and are to be and be considered due and payable, and all credit thereon to cease, together with all interest which

may have accrued thereon, and the balanceif any, pay over to the said party of the first part, his executors, administrators, or
40 assigns. But in case the said party of the first part, his executors or administrators, do and shall well and truly, without default, and without having suffered and permitted any rent to have become due and owing, and remained due and owing as aforesaid, or any judgment to be recovered and execution to be issued and levied as aforesaid, pay and satisfy said promissory note, and all and every promissory note or notes given in and by way of renewal thereof, together with all interest which may accrue thereon when and as the same shall become due and payable, then and in that case the said party of the second part, his executors, administrators, or assigns, do and shall, at the request and cost of the said party of the first part, his executors, administrators or assigns, make and execute unto him, the said party of the first part, his executors, administrators, and assigns, good and sufficient deed of release of all and singular the said goods and chattels, household stuff and kitchen furniture. And the said party of the first part, for himself, his heirs executors, administrators, by these presents, covenants, promises, and agrees to and with the said party of the second part, his heirs, executors, administrators, and assigns, the said goods and chattels, household stuff and kitchen furniture, hereby bar-
41 gained, sold, and conveyed, to insure and keep insured in the full sum of five thousand dollars, in some good and safe insurance office in the city of Washington, during the continuance of this trust, and the policy and policies of such insurance or insurances, and the proceeds thereof from time to time during the continuance of this trust, to assign, transfer, and set over, unto him, the said party of the second part, his executors and administrators, to, for, and upon the uses and trusts, intents and purposes, in this indenture mentioned; and in case of a failure on the part of the said party of the first part, his executors or administrators, to so insure and keep insured the said goods and chattels, household stuff and kitchen furniture, and the policy or policies of such insurance or insurances, and the proceeds thereof to assign, transfer, and set over, as aforesaid, it shall and may be lawful to and for the said party of the second part, his executors or administrators, to so insure and keep insured the said goods and chattels, household stuff and kitchen furniture, and the costs, charges, and expenses of such insurance or insurances, shall and may be and be considered part and parcel of the debt hereby secured or intended to be secured, and payable out of the proceeds of any sale or sales made in and by virtue of
42 these presents, and by the said party of the first part, his executors, administrators, or assigns, before the making or executing of any deed of release, as hereinbefore provided.

In testimony whereof, the said party of the first part has hereunto subscribed his name and affixed his seal on the day and year first hereinbefore written.

M. A. DEXTER. [SEAL.]

Signed, sealed, and delivered in presence of—

T. C. DONN.

JNO. S. FINCH.

Schedule "A," referred to in the foregoing deed of trust.

23 mahogany and walnut French bedsteads; 25 maple bedsteads; 45 mahogany and walnut bureaus; 45 mahogany and walnut wash-stands; 5 dozen mahogany chairs; 4 large easy chairs; 1½ dozen large easy French rocking-chairs; 2 bedstead sofas; 8 dozen oak dining chairs; 48 hair mattresses; 24 small tables; 6 mahogany sofas; 11 walnut dining tables: 4 rosewood sofas; 2 large oval rosewood chairs; 1 dozen rosewood parlor chairs; 45 bed spreads; 100 pairs linen sheets; 50 pairs blankets; 16 silver-plated entry dishes; all the china, glass, and earthenware; all the cutlery, knives, forks, and spoons; all the kitchen furniture; all the marble tiling on floors, and the steam boiler, pipes, and other steam fixtures, &c., and 100 feather pillows and cases, and 100 bolsters.

M. A. DEXTER.

43 DISTRICT OF COLUMBIA,
Washington County, to wit:

On this sixth day of November, 1855, personally appeared before me, the subscriber, a justice of the peace in and for the county and District aforesaid, Melvin A. Dexter, party grantor to the foregoing instrument of writing and deed of trust, and acknowledged the same to be his act and deed, for the purposes therein set forth.

T. C. DONN, *J. P.* [SEAL.]

And it further appeared in the evidence that default was also made in the payment of the notes described in the last aforegoing deed, and that both the said notes were in the possession of an agent of the said Wendell, before and at the time of the said sale, and that the proceeds of the said sale, including the goods replevied as aforesaid, did not suffice to pay both the said notes, and that the said agent (who was examined as a witness) had searched diligently for the said notes but could not find the same and did not know what had become of them. And the defendant further gave evidence that the said sale was by public auction begun on the said 12th May, and continued to and after the said 18th May, and was made article by article, with the view and intention that the same should be delivered to and removed by the respective purchasers after the
44 conclusion of the whole sale, and that the whole proceeds of the said sale, which was of all the furniture, goods, and chattels upon the premises, after paying expenses and commissions, were paid to the said Wendell on the said notes as aforesaid by the plaintiff, and that pending such sale and on the 18th day of May, aforesaid, the defendant claiming one whole year's rent, to wit, the sum of three thousand dollars, by reason of the said sale and proceedings under the said deed of trust, then and there levied a distress for the said sum upon goods and chattels found on the premises, which are the goods and chattels in the declaration mentioned. And further, that the proceedings of the plaintiff in the premises were with the

knowledge of the said Dexter, and without any hindrance by him, but that he was present at the sale, and did all in his power to make the goods bring the best prices.

That immediately after the said sale, the said Dexter abandoned the said premises, leaving the keys in the possession of the auctioneer, who delivered them to the defendant, in pursuance of a note of that date, made part hereof.

Letter from Thos. J. Fisher to Anne R. Dermott.

WASH., D. C., *June* 23, '57.

Mrs. ANNE R. DERMOTT:

D'R MADAM: A person, by direction of Mr. Dexter, left the
45 keys of your house with me a few days since, which you can have by calling for them.

Very respectfully,

THO. J. FISHER,
At Jas. C. McGuire's.

And that shortly afterwards the said Dexter removed to Kansas.

Def't's bill of exceptions.

And the plaintiff then gave evidence that the defendant took possession of the said hotel and premises on the 23rd day of June, 1857, and during the same summer rented the same to another tenant. And thereupon the defendant prayed the court to instruct the jury as follows:

No. 1. If the jury find from the evidence aforesaid that the plaintiff, acting under the deeds of trust to him, read in evidence, or one of them, took the goods and chattels by the writ of replevin issued in this cause, out of the possession of the defendant, then the plaintiff is not entitled to recover, because said deeds of trust are, on their face, fraudulent and void.

No. 2. If the jury find from the evidence aforesaid that possession of said property described in the deeds of trust to the plaintiff, which were read in evidence, did not follow and accompany said deeds, or either of them, but the possession thereof remained in said Dexter until the defendant's testatrix took the property
46 named in the declaration of the plaintiff, as and for a distress for rent due to the defendant, and that the same was taken as stated in the avowry, on the premises described in the lease from the defendant, read in evidence. then the plaintiff cannot claim the said property under or by virtue of said deeds, or either of them, as against the defendant's testatrix.

No. 3. If the jury find from the evidence aforesaid that prior to the bringing of this suit, and after the first day of May, 1857, the said plaintiff, acting under the deeds of trust to him, read in evidence, or one of them, was attempting to remove the goods and chattels described in the declaration, and that the same were then

on the premises described in the written lease from the defendant's testatrix to said Dexter, read in evidence, and were part of the furniture of said Dexter, on said premises, at the date of the first of said deeds of trust; and if the jury further find that the said plaintiff was attempting to remove the said goods as aforesaid, with the privity and assent of said Dexter, from said premises, without replacing them with others of equal value, and without the consent, in writing, of the defendant's testatrix, then and immediately thereupon, by the force and effect of said lease read in evidence, the sum of three thousand dollars, as and for one year's rent over and
47 above all rents then accrued under said lease, became due and owing from the said Dexter to the said defendant's testatrix, and the said testatrix was thereupon entitled to recover said three thousand dollars by levying a distress therefor, upon such goods and chattels as were then found on said premises liable to distress for rent; provided the jury find that at the time of the removal and attempted removal of the goods and chattels as aforesaid, there remained more than one year of the term mentioned in said written lease unexpired.

No. 4. If the jury find from the evidence aforesaid that the said Dexter or the said plaintiff, as his assignee of the goods and chattels described in the declaration, was, on the 18th May, 1857, attempting to remove the goods and chattels on the premises, described in the written lease read in evidence, without the consent in writing of the said Anne R. Dermott, and without replacing the same with goods and chattels of equal value, then and immediately thereupon, by the force and effect of said written lease, the sum of $3,000, as and for one whole year's rent over and above all rents theretofore accrued, became due and owing from the said Dexter to the said Anne R. Dermott; and it was lawful for the said Anne to levy the said $3,000 by a distress upon the goods and chattels then
48 found upon the premises liable to distress for rent. And if the jury further find that the property described in the declaration was then upon said demised premises, and was levied upon by said Anne R. Dermott for the recovery of said sum of $3,000, so found by the jury to be due and owing to her as aforesaid, then the plaintiff is not entitled to recover in this action. But the court rejected each of said prayers, and refused to instruct the jury as prayed in said prayers. And thereupon the defendant excepts, and this his bill of exceptions is signed and sealed this 29th day of May, 1862, to have the same effect as if the refusal of the court to grant each of said prayers was separately excepted, &c.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]
[SEAL.]

Appeal prayed and granted.

And whereas afterwards, to wit, on the 7th day of June, 1862, the said defendant, by his attorney aforesaid, produced and filed in court

here the United States writ for the correction of errors of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia for the county of Washington, and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto
49 relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is hereby transmitted to the said Supreme Court, accordingly.

In testimony whereof, I have hereunto subscribed my name and affixed the public seal of said court this 17th of July, 1862.

[SEAL.] JNO. A. SMITH, *Cl'k.*

99

SUPREME COURT OF THE UNITED STATES,

December Term, 1863.

JOHN P. INGLE, EXECUTOR OF ANN R. DERMOTT

vs.

CHARLES A. WALLACH.

BRIEF OF PLAINTIFF IN ERROR.

The Defendant in Error replevied certain personal effects which the testatrix of the Plaintiff in Error had distrained.

Issues were joined on the replications filed to the avowry, which replications alledged that the $3000 avowed for was not in arrear, and that the sum was not demanded by the testatrix of the tenant Dexter.

See Avowry, in page 7.
Replications and Issues, p. 9.

The verdict of the jury only responded to the first issue, finding no rents in arrear, and the Court gave judgment in favor of the Defendant in Error.

The avowry sets forth the lease made of certain premises to Melvin A. Dexter, by which it was stipulated that if he should at any time during his term of three years, commencing on the 1st October, 1855, remove or attempt to remove any of his goods, &c. from the demised premises without the consent in writing of the Plaintiff in Error, except the same should be replaced with goods, &c. of equal value, then and immediately upon the happening thereof, one whole year's rent, to wit: $3000, *over and above all rents then accrued*, should immediately thereupon accrue and become due by the said Dexter to the said Anne R. Dermott, and might be levied by distress. The avowry then alledges that Dexter attempted to remove and did in fact remove

divers goods, &c. from said premises without the written consent of the Plaintiff in Error, and without replacing the same, &c. whereby *one year's* rent, to wit: $3000 became due and payable, and the same was demanded, &c. and she well avows the taking of the goods, &c.

The second count of the avowry is simply an avowry for $3000 rent in arrear.

The bill of exceptions contains a statement of all the facts, beginning at Record, p. 10.

The deeds of trust from said Dexter to Wallach appear in Record, p. 11 and 17.

And the lease appears in Record, p. 14, &c.

Dexter having assigned his effects to Wallach, as trustee, to sell, and assisting himself in the sale, in the manner stated, it is clear that he and his assignee were attempting the removal of the goods on the premises, which were the security for the rents accruing, and therefore he deliberately violated his agreement, and caused the sum of $3000, for one year's rent, to become due and payable in advance of the time it would otherwise have accrued. The distress being for this sum was perfectly legal, and the rent was as much due by the express contract of the parties as rent is due under any ordinary demise.

It further appears that Dexter left the premises, and sent the key to the Defendant in Error before his time expired. Record, p. 21.

If this were the case of a penalty on default of payment of stipulated rent, there must be a demand of the rent strictly as much as in case of a forfeiture of the lease for non-payment of rents, and the reason is that the demand is necessary to establish a wilful default by the tenant.

Gilbert on Rents, (20 Law Lib. 141, side page.)

The demand, when necessary, is merely to fix a wilful default. But here is a breach of a special covenant, by removing or attempting to remove the goods, a wilful act *ex vi termini*, and the one year's rent is made payable in advance and distrainable by express contract. There is no necessity of a previous demand, as in case of a penalty for not paying a stipulated rent.

The right to this advance rent arises here by the wilful act of the tenant in removing, &c. goods, &c. It is but a stipulation to pay the rent for one year in advance, a breach of an obligation, collateral to the payment of rent, and it is the same as if the tenant had expressly agreed to pay $3000, in case he pulled down the house, &c.

Vin. Ab. Rent, Hb.

Br. Tender, pl. 23.

It is not usury in a contract to increase the interest on default of paying legal interest at a stipulated time, but it is a mere penalty recoverable at law, though restrained in equity.

1st Parsons Contracts, 393, (note.)

But equity would not relieve a case like the present.

Taylor on Landlord, § 496.

2 Story's Eq. § 1321, &c.

Even if this be in the nature of additional rent, and if the deed had required it to be demanded the distress itself is a sufficient demand.

2 Platt on Leases, 107—9.

2 Bro. P. C. 44.

Gilbert, Rents, 78, 79, (side p.)

Offut *vs.* Trail, 4 H. & J. 20.

It is manifest that the deeds of trust from Dexter to the Defendant in Error on which he relies involve the same principle as our lease, by providing for the immediate maturity of the notes, upon certain contingencies, in advance of the time limited in the notes themselves; yet such stipulations are no forfeiture.

See 7 Paige, 180.

28 Barbour, ~~26~~ 29 4 Jacob 227

37 —— 60. 5 Bebbld 40

I call attention to these deeds of trust, because of the gross fraud *meditated* on their face towards creditors, and will contend that the Court erred in rejecting each prayer of the Plaintiff in Error, and that the allegation in the first count of the avowry that a demand of the rent was made, is immaterial, and need not be proved

12 Peters, 335.

1 Chit. P. 611.

—— 228.

Dexter by these deeds retains the possession of his property, so long as he pays interest, until the credit expires, but the whole debt becomes *ipso facto* due the moment a creditor or his landlord, attempts to disturb his enjoyment of that property.

This seems to be against the policy of the law, unless the property was limited over as on a condition to a third party.

18 Vesey, 432, 433.

In this case the mortgagor has illegally guarded his own possession and user of the property, and therefore the mortgage is void on its face as against all creditors whose seizure of the property it was intended to prevent.

1 Swanston, 481, note.

Miss Dermott as a creditor for rent has a right to object to these deeds, but if no rent was due to her, still having seized the goods, her possession was not to be divested by the Defendant in Error claiming a title void on its face for fraud.

8 G. & J. 429, fourth prayer and 432. 2 Black 40

The design of these deeds is not only to give Dexter the possession until his creditors attempt to execute his usufructuary interest in the

property, but they are equally prejudicial to Miss Dermott's rights, and equally in fraud of her right to distrain for rent.

On a question of fraud in a deed, we are to look at the provisions when executed, and not to enquire whether afterwards it was used fraudulently. If it avows fraud on its face, it is void.

It will further be observed that the lease did not expire until the 1 October, 1858, (Record, p. 15) and that the attempted removal of the goods, and consequent distress levied thereon, took place on the 18 May, 1857, (Record, p. 14,) when the term of demise had nearly eighteen months to run.

By looking at these dates, it will be seen, that making one year's rent due in advance, on the 18 May, 1857, did not deprive the tenant of his enjoyment of the premises for another year.

The effect of making a year's rent due in advance, might have been a more serious question, if the tenancy was to expire within the year, for which rent was claimed in advance, but our case is involved in no such difficulty, and Mr. Dexter could have enjoyed his property, by simply paying one year's rent in advance, as he had stipulated to do, if he attempted to remove from the property the security to which his landlady looked for her rents.

The extent of the alledged forfeiture on these facts, is merely to make him pay one year's rent in advance, while he still had the privilege of holding the property until the end of his term.

As the lease might have stipulated for all the rents in advance, it cannot be objected that such a stipulation, when made conditional on the breach of a covenant by the tenant, is to be regarded as a forfeiture, requiring a previous demand.

R. J. BRENT,

For Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 176.

JNO. P. INGLE, EXECUTOR OF ANN R. DERMOTT,
PLAINTIFF IN ERROR

vs.

CHARLES S. WALLACH.

IN ERROR TO THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

This was an action of replevin. The defendant avowed the taking as a distress for rent. The plaintiff replied, first nothing in arrear; and secondly, traversing the demand. On both issues, a verdict was found for the plaintiff below, who is the defendant in error.

The facts were as follows:

Ann R. Dermott, by articles of demise and convenant, dated August 18, 1855, leased certain property in Washington to Melvin A. Dexter, for three years from Oct. 1, 1855, for the yearly rent of $3,000, payable in monthly installments of $250. The articles contained a covenant against assigning or underletting; and, also, a covenant "that he (Dexter) shall not, and will not, at any time or times during the said term, or extended term, remove, or attempt to remove, any of his goods, chattels, wares, or merchandises from the said premises, without the consent, in writing, of the said Ann R. Dermott, except the same be replaced of equal value;" and it was further agreed that "if he, the said Melvin A. Dexter, shall, at any time or times hereafter during the said term, or extended term, so assign or underlet the said demised premises, or any part or parcel thereof, without such consent as aforesaid, or if he shall, at any such time or times, without such consent, remove, or attempt to remove, any of his goods, chattels,

&c., as aforesaid, then, and in either case or event, the said term, and extended term, shall, at the sole option and election of the said Ann R. Dermott, utterly cease and determine; and the said Ann R. Dermott, shall and may, at her sole option and election, immediately thereupon re-enter upon and repossess herself of the said demised premises, and expel therefrom the said Melvin A. Dexter, and every assignee or undertenant who may be found in possession; and, moreover, that in either of the said cases, and immediately upon the happening of either of the said events, one whole year's rent—to wit: the rent of three thousand dollars, over and above all such rents, that is to say, all such of the rents hereinbefore reserved to be paid on the first day of each and every month during the said term, or extended term, as shall have then already accrued,—shall be, and by these presents is, reserved to be paid by the said Melvin A. Dexter, to the said Ann R. Dermott, and shall immediately thereupon accrue and become due and owing from him, the said Melvin A. Dexter, to her, the said Ann R. Dermott, and shall and may be levied by distress and sale of all such goods and chattels as shall or may be there found on the premises liable to distress for rent."

Dexter took possession, and afterwards executed two deeds of trust of the household furniture to Charles S. Wallach, the defendant in error, dated respectively, November 5, 1855, and October 24, 1856, to secure two notes, of $5,000 each, in favor of Cornelius Wendell.

The last note not being paid at maturity, the trustee advertised, under the deed, the household furniture, &c., for sale, on the 12th of May, 1857, and was proceeding, with said sale continued, on the 18th of May, when Ann R. Dermott levied a distress upon the goods, &c., for the sum of $3,000. The rent up to the 1st of May, had been previously paid.

Dexter left the key with the auctioneer, and they were soon after received by Miss Dermott, and she rented the house to another person.

The defendant in error, immediately after the levy of the distress, replevied the property.

At the trial below, the plaintiff in error asked four instructions to the jury, which the court refused, (pp. 21 and 22, of record,) and this refusal is assigned as error.

In opposition to the propositions of law on which 2d and 3d, instruction prayed for rest, it will be maintained—

1. That the sum of $3,000 mentioned in the stipulation aforesaid was reserved as a *penalty*, and not as *rent* or *liquidated damages*.

The distinction between cases in which sums reserved to be forfeited in certain contingencies are treated as penalties, and those in which they are considered as liquidated damages, is stated in

2 Greenleaf on Evidence, sec. 247, 258, and 259. See, also cases cited, (Astley *v.* Weldon, 2 B. and P., 346. Kemble *v.* Farren, 6 Bing., 141. Boys, *v.* Ancell, 5 Bing., N. C., 390. Charrington, *v.* Laing, 6 Bing., 342. Also, Reindell, *v.* Schell, 4 Comm. B. 97. Comyn's *Landlord and Tenant*, p. 571.)

From these authorities, it appears that whenever it is doubtful what the intent of the parties was, or where there may be breaches of the agreement of different degrees of importance, and a gross sum is payable for any breach, however unimportant, or where the damage is capable of being certainly known, the sum will be treated as a *penalty*, whatever the parties may have called it. On the other hand, where it is impossible to estimate the damage, or a rate of forfeiture proportioned to the damage is reserved, it is considered liquidated damages, or, sometimes, an *increased rent*, or *penal* rent.

The present clearly comes within the first class of cases. The removal of the most trifling articles of furniture, and that but a week before the expiration of the lease, would, according to the terms of the instrument, entail upon the tenant the forfeiture of the whole sum of $3,000, as well as of his lease, equally with the removal of the whole contents of the house at the commencement of the term. It is apparent, too, in this case, that the utmost damage which the plaintiff in error could have suffered was the loss of about two months' rent, for which she claims a whole year's rent.

2. If this was a case of *penalty*, the plaintiff in error had no right to distrain for it.

Before the stat. 8 and 9, William III, c. 11, sec. 8, a party might obtain judgment at common law, for the whole amount of the penalty of a bond. But even then the distinction between penalties and liquidated damages was known; and in the former case, courts of equity would restrain proceedings at law, and direct an issue of *quantum indemnificatus*. And now, in the common law courts, a judgment can only be had for the actual damage. (See *Comyn, supra.*)

If a party cannot obtain judgment for a penalty, *a fortiori*, he cannot distrain for it. The right of distress, which is a right to take the law into one's own hands, is exceptional, and not to be favored or extended. It is of the very essence of this right that the rent or service distrained for should be certain in amount and time of payment, and therefore distress was never allowed where the services due were uncertain, in either respect. *Bradby on Distress*, p. 26.) Nor can agreement of the parties make any difference in this respect. (*Id.*, p. 25.) No case can be found in which a distress for a penalty has been sustained.

3. By the common law, where a *nomine pœnæ* is given for non-payment of rent, the lessor must *demand* the rent before he can